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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1631

RALPH NOE,

Petitioner,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner, Ralph Noe, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause denying petitioner leave to appeal from a judgment of the Appellate Court of Illinois, First District.

OPINION BELOW.

The opinion of the Appellate Court of Illinois appears as an appendix to this petition and is reported at 263 N.E. 2d 889. The first opinion of the Appellate Court of Illinois is reported at 71 Ill. App. 2d 347, 219 N.E. 2d 111.

JURISDICTIONAL STATEMENT.

Judgment was entered in the Appellate Court of Illinois on November 6, 1969. A petition for rehearing was duly filed and it was not until October 30, 1970 that the Appellate Court acted on the petition, denying it. Petition for leave to appeal was denied by the Supreme Court of Illinois on January 26, 1971, and the judgment became final on that date.

The jurisdiction of this Court is invoked under Sections 1257(3) and 2101(c), Title 28 United States Code, providing for review by this Court by writ of certiorari where a right is specifically granted under the statutes of the United States.

The federal rights claimed in this case and involved in the cases presented herein arise under the Federal Employers' Liability Act, Title 45, Sec. 51, et seq., United States Code.

QUESTIONS PRESENTED.

The questions presented on this appeal are of far-reaching consequence concerning litigation involving the Federal Safety Appliance Act. They are:

In an action under the Federal Safety Appliance Act may a state court, contrary to the decisions of this Court, decide that a violation of the Federal Safety Appliance Act is determined not by how the instrumentality operated on the occasion in question but by the due care previously employed by the carrier?

May a state court, notwithstanding the mandates of Congress and this Court consider the violation of the Safety Appliance Act in the light of negligence principles?

May a state court determine what is a violation of the Federal Safety Appliance Act contrary to the decisions of this Court without violating Article VI of the Constitution of the United States?

STATEMENT OF THE CASE AND ADDITIONAL FACTS.

This case has been before the Illinois Appellate Court on two occasions. On the first (71 Ill. App. 2d 347, 219 N.E. 2d 111) appeal by the plaintiff, the court reversed the judgment for failure to submit the Federal Safety Appliance Act violation to the jury. On the second appeal the court held the Federal Safety Appliance Act did not apply. And this notwithstanding the evidence was much the same as the first trial, as the opinion (p. 7a) observes: "In the first trial of the case the evidence adduced was much the same as in the instant trial . . ."

A negligence count and a second count charging a violation of the Safety Appliance Act were submitted to the jury in accord with the mandate of the Appellate Court on the second trial. There was a general verdict for the plaintiff.

On the second appeal, for the first time, the argument was successfully advanced that the doctrine of last clear chance did not apply because defendant's failure to have its train brakes operate efficiently in accord with the directive of the Federal Safety Appliance Act was antecedent to plaintiff's negligence.

This holding of the Illinois Appellate Court is in violation of the teaching of the United States Supreme Court that the failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong and in no way dependent upon negligence. In a word, there is no antecedent negligence involved but a wrong

which arises out of the failure of the brakes to operate efficiently on the occasion in question.

As described in the opinion, the equipment was a crane, with an overall length of 50 feet, having a boom 40 feet long. Its cab was seven feet wide, and its roof was twelve feet above the ground. The equipment had a maximum speed of two miles per hour. (A. 26)

At the time of the impact, all but the last eight inches of this 50-foot long unit was over the tracks. From the time it came to a stop until the time of the impact, it had traveled 60 feet. If it were traveling the maximum speed when it entered the tracks at two miles per hour, it would have been on the tracks for over 16 seconds before it was struck.

When it is considered that the equipment started from a dead stop (A. 26), it must have been on the tracks at least 20 to 25 seconds before it was struck.

The accident happened three-quarters of a mile from the curve. (A. 29) Three-quarters of a mile is 3,960 feet. According to defendant's records, the weather was clear, calm and no fog. (A.A. 3)

Briggs, the engineer, said he was looking straight ahead. He says he was one-quarter of a mile, or a little farther, when he first saw the object. When he got closer, he saw the boom was across he tracks, and he then set the brakes in emergency. (A. 29, 30)

Arthur J. Johnson, the fireman, said the train was going 35 to 40 miles per hour as it came around the curve. The headlight projected a beam. He could see. As he was looking ahead, he saw a long object that extended

over the tracks to the left hand rail. He stated he was close to 2,000 feet away when he first saw this object over the tracks. (A. 73) He recognized it as a crane about 1,000 feet away. (A. 74) The engineer did not throw the brakes into emergency until they were 700 to 800 feet away. (A. 74)

Bergman, defendant's expert, stated the train should be stopped at 35 miles an hour in 971 feet, (A. 70) and at 40 miles an hour in 1,321 feet. (A. 69)

The following facts stand uncontradicted:

1. The train was traveling 35 to 40 miles an hour;

2. The fireman of that train saw the object on the tracks when the train was 2,000 feet away from the crossing;

3. The crane, 50 feet long, had crawled over the tracks, except for its last eight inches, when it was struck by the train;

4. The engineer did not apply the brakes until 700 or 800 feet away, notwithstanding his own fireman had seen this object committed to the crossing when the train was 2,000 feet away.

FOREWORD.

Congress, not the States, enacted the Federal Safety Appliance Act. 45 U.S.C. 1, et seq. This Court in *Fairport R. Co.* v. *Meredith,* 292 U.S. 589, 596 (1933) has held that the Act applies to a traveler upon the highway and the carrier's duty is absolute, stating:

> "Sections 1 and 9 of the Safety Appliance Act converts this qualified duty imposed by the common law into an absolute duty, from the violation of which there arises a liability for an injury resulting therefrom to any person falling within the terms and intent of the act."

So also this Court has pointed out the error of determining a violation of the Act in the light of negligence principles. *O'Donnell* v. *E. J. & E. R. Co.,* 338 U.S. 384, 390 (1949).

Here, however, the Appellate Court has determined that defendant's wrongful act is determined not how the brakes operated on the occasion in question but rather whether the train was placed on the tracks with defective brakes, saying:

> "Plaintiff argues that a violation of the Safety Appliance Act is determined as of the time the brakes actually failed to operate properly, not at the time the train was placed on the tracks with defective brakes. Hence, it is argued, the wrongful act occurred after plaintiff's contributory negligence and cannot be said to be antecedent."

Such a construction would enervate the meaning of the Safety Appliance Act. The Act would not be considered

as imposing absolute liability but rather one dependent upon negligence norms. We are, of course, conscious that this Court has determined that whether the defense of contributory negligence is available to a non-employee is a matter for determination by a state. *Crane* v. *Cedar Rapids & I. R. Co.*, 395 U.S. 164 (1968). However, we are not dealing with that issue here. Inherent in this appeal is the question whether a state may determine what constitutes a violation of these Federal Acts—a matter never left to state determination.

The criteria of what constitutes a violation of these federally created rights is a matter solely for federal determination if such rights are to have any uniformity.

The state court decided that the violation of the Safety Appliance Act is determined not how the brakes actually operated at the time in question but rather whether the train was placed on the tracks with defective brakes. This, of course, is contrary to the *Fairport* decision of this Court.

ARGUMENT.

WHAT CONSTITUTES A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT IS NOT DETERMINED BY NEGLIGENCE PRINCIPLES BUT RATHER HOW THE APPLIANCE OPERATED ON THE OCCASION IN QUESTION.

The Illinois Court considered the failure of the Safety Appliance Act in a novel light. It held the failure of train brakes to operate efficiently was no breach of defendant's duty since defendant's wrong in having inefficient brakes was antecedent to plaintiff's negligence. It commingled negligence with a construction of the violation of the Federal Safety Appliance Act according to negligence propositions.

In determining the issue as to what constitutes a violation of the Safety Appliance Act it held that there must be some defect or inefficiency shown to exist prior to the occurrence. But this is not the test of the violation of the Safety Appliance Act. It has been said on multiple occasions: "The duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance 'on the occasion in question'." *Affolder* v. *New York, C. & St. L. R. Co.,* 339 U.S. 96, 98.

In *O'Donnell* v. *Elgin, J. & E. R. Co.,* 338 U.S. 384, 390, the Court noted:

1. The failure of the equipment to perform on the occasion in question was an actionable wrong.

2. Plaintiff could add nothing by showing negligence nor could defendant defend by due care no matter how assiduous.

Since this question is so important we shall, with the indulgence of the Court, quote from the *O'Donnell* case. At page 390, it is said:

> ". . . For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. *St. Louis, I.M. & S.R. Co.* v. *Taylor,* 210 U.S. 281, 294; *Chicago, B. & Q. R. Co.* v. *United States,* supra, 575-577; *Delk* v. *St. Louis & S.F.R. Co.,* 220 U.S. 580. These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: 'The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous.' *Brady* v. *Terminal Railroad Assn.,* 303 U.S. 10, 15."

That liability under the Act is wholly independent of defendant's conduct prior to the time the appliance is called upon to perform is pointed out in that opinion with the Court stating at page 393:

> "The plaintiff, for example, can add nothing to the liability incurred from a violation of the Act by producing evidence of negligence. Here there was affirmative and, so far as we can find, uncontradicted testimony that there was a 'partial fracture on the inside of the coupler,' indicating that the coupler was weakened by an old defect. However important this evidence might have been in determining common law negligence, it added nothing to the direct case under the Safety Appliance Act made by showing the breaking of the coupler."

That decisions of the United States Supreme Court are binding upon all courts in the interpretation of these Acts of Congress is well established. (See *Rogers* v. *Mo. Pacific RR. Co.,* 352 U.S. 500, 509; *Dice* v. *Akron, C. & Y. RR.,* 342 U.S. 359, 363; *South Buffalo Ry. Co.* v. *Ahearn,* 344 U.S. 367, 372.

No state law can determine what is a violation of the Safety Appliance Act. That field has been preempted by Congress. There is no authority whatsoever that state law determines what constitutes a violation of the Federal Safety Appliance Act or its companion Acts.

There are no authorities, including negligence cases cited, which support the opinion of the Illinois Appellate Court. The opinion refers to *Menke* v. *Peterschmidt,* 69 N.W. 2d 65 (Iowa 1955), and *Vreugdenil* v. *Kunkel,* 127 N.W. 2d 630 (Iowa 1964), as authority for the proposition that the doctrine applies only when the defendant discovers plaintiff's danger.

Vreugdenil v. *Kunkel,* an automobile collision case, holds the doctrine to be a basis of recovery where defendant driver came over a hill 140 feet from where he could first discover plaintiff's station wagon with which he collided seconds later (pp. 634, 635).

In the *Menke* case, the Court was concerned with whether the defendant had adequate time after the discovery of plaintiff to act. Said the Court: "To predicate negligence on two seconds of time is in and of itself monumental refinement." (69 N.W. 2d 65, 72).

No such refinement complicates this action. Here, the engineer saw plaintiff in time to apply his brakes at a distance of 1320 feet or more, while traveling at a speed

of only 35-40 miles per hour. A vehicle traveling at a *constant* speed of 35 miles per hour moves 51.3 feet each second; at 40 miles per hour, it travels 58.6 feet per second. The train would thus traverse 1320 feet in approximately 22-25 seconds. This is the absolute theoretical minimum. It must be borne in mind that the engineer testified that the brakes were applied at a distance of one-quarter mile (1320 feet) from the crossing—*or more.* (A. 30, A.A. 4, 5)

Anderson v. *Bingham & Garfield Ry. Co.,* 214 P. 2d 607 (Utah 1950), is the only authority involving brakes referred to by the Illinois Appellate Court. Its interpretation of what constitutes a violation of the Federal Safety Appliance Act is whether such is an actionable wrong is at loggerheads with the decision of this Court in *O'Donnell* v. *E. J. & E. R. Co.,* 338 U.S. 383, 390, and others.

More than that, in that case the Court noted:

> ". . . it is undisputed that the engineer had no opportunity to avoid the collision with the alleged defective brakes which he had at hand."

Here, as we have noted, the crew waited for a prolonged period of time before applying the brakes.

Contrary to the Utah Court, in *Fairport, P. & E. RR. Co.* v. *Meredith,* 189 N.E. 10 (Ohio 1933), affirmed 292 U.S. 589, the Ohio Court pointed out that if this rule were employed, all railroads would be abrogated from liability for violation of brake requirements, stating at p. 14:

> "To hold that the failure to use air brakes after the discovery of plaintiff's danger was not then an act of neglect would abrogate the rule of known danger.

> It would under such working of that rule free all railroads from any liability while operating in violation of air brake requirements."

Indeed, even in cases determined without the benefit of a statute such as this, the courts have rejected the doctrine that plaintiff had to prove defendant's negligence in maintenance of brakes prior to the occurrence.

Even in negligence cases, this proposition has been condemned. The Judicial Committee of the Privy Council, in the leading case of *British Columbia Electric Ry. Ltd.* v. *Loach*, 1 A.C. 719 (1916), a decision representing the view taken by the English and Canadian Courts, points out that the railroad would, under the interpretation of the Appellate Court, be in a better position had it supplied a careless motorman with an efficient brake stating:

> "Were it otherwise, the defendant company would be in a better position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands (the plaintiff's intestate), the motorman strove to apply, they would not be liable, but if the motorman failed to apply the brake, which, if applied, would have averted the accident, they would be liable."

Professor Prosser, in his Law of Torts, 3d Ed., says at p. 442:

> "A further problem arises where the defendant, after discovery of the danger, does what he can to avoid the injury, but his prior negligence prevents his efforts from being effective—as, for example, where he tried to stop his car, but cannot do so because of defective brakes. No reason is evidence in such a case for distinguishing between the antecedent neg-

ligence of the defendant and that of the plaintiff who has got himself into danger; . . ."

In the footnote, he states:

"Suppose that A is lying drunk and unconscious in the street, and B, driving a car, sees him and endeavors to stop, but cannot do so because of defective brakes. Are we to say that B's antecedent negligence makes him liable for A's injuries, but that A's antecedent negligence does not make him responsible for B's—or his own?"

Is it consistent with the statutory duty of the defendant to exculpate it if it puts a train with defective brakes on the tracks where it will meet travelers on public highways?

THE OPINION OF THE ILLINOIS APPELLATE COURT IN DETERMINING THAT A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT IS DETERMINED BY PRIOR CONDUCT VIOLATES ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE FOURTEENTH AMENDMENT OF THAT CONSTITUTION.

Simply stated the question inherent in this appeal is: May an Illinois Appellate Court determine what is a violation of the Federal Safety Appliance Act counter to the interpretation of that Act by the National Supreme Court?

Article VI of the United States Constitution provides in part:

"The Laws of the United States . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any time in the Constitution or Laws of any State to the contrary notwithstanding."

In *Lee* v. *Florida*, 392 U.S. 378, the National Supreme Court noted (p. 385):

> "But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.' *Elkins* v. *United States,* 364 U.S. 206, 222. Under our Constitution no court, state or federal, may serve as an accomplice in the wilful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State (are) bound . . .'"

Here, the opinion of the Illinois Appellate Court has held that a violation of the Federal Safety Appliance Act is not determined by how the appliance operates on the occasion in question. Under the decisions of the Supreme Court the failure of the equipment to perform on the occasion in question is an actionable wrong creating a federal right of action. (See: *O'Donnell* v. *E. J. & E. R. Co.,* 338 U.S. 384, 390.)

What constitutes a violation of the Federal Safety Appliance Act is determined not by State law but by the decisions of the United States Supreme Court. (See: *Rogers* v. *Mo. Pacific RR. Co.,* 352 U.S. 500, 509; *Dice* v. *Akron, C. & Y. RR.,* 342 U.S. 359, 363.)

Neither the Illinois Appellate Court nor any State court can define a violation of this Federal statute contrary to the definition of violation by the National Supreme Court. Its decisions on this issue are the supreme law of the land. They must be adhered to by State courts, as noted in *Chesapeake & Ohio Ry. Co.* v. *Martin,* 283 U.S. 209, 220, 221, wherein Justice Sutherland stated at pp. 220-221:

> "But the vice of this position is that, in following its own prior decision, the [state] court ignored the decision of this court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the ap-

> plication of federal law. The determination by this court of that question is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding."

While we agree that a State court can determine what constitutes contributory negligence or the doctrine of last clear chance, it cannot preempt the Federal definition of the violation of this Federal Act. If this were possible it could make the violation dependent upon negligence which is the concept of the Illinois Appellate Court.

In violating Article VI of the Federal Constitution there was an inherent impairment of plaintiff's rights guaranteed by the Fourteenth Amendment of the Federal Constitution. Obviously this impairment was without the constitutional requisite of due process.

Due process, it has been frequently said, is not susceptible of definition in exact terms. It assumes multiple shapes and forms.

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. (Cases) 'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions . . .' *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 162-163 (concurring opinion.)" (*Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895).

CONCLUSION.

Contrary to the Congressional mandate and the teachings of this Court, this important decision construes the Safety Appliance Act according to negligence principles.

This not only affects the rights of the particular petitioner in that he was deprived of his verdict, but can well affect the rights of multiple litigants.

It is respectfully submitted that this Court grant certiorari in accord with its efforts to have a uniform interpretation of these Federal Acts and to reverse the judgment of the Appellate Court of Illinois, First District, which became final by the Illinois Supreme Court's denial of petitioner's effort for leave to appeal.

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APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Justice Schwartz Delivered The Opinion Of The Court.

Plaintiff brought an action to recover for injuries to person and property sustained in a grade crossing collision in Iowa on September 21, 1953 between a crane driven by the plaintiff and a train operated by the defendant. The claim is based on two counts: (1) common law negligence, and (2) a violation of the Federal Safety Appliance Act. In a former trial the jury found for the defendant on Count One and the court directed a verdict for the defendant on Count Two. On appeal we reversed and remanded the cause for a new trial. *Noe* v. *Chicago Great Western Ry.*, 71 Ill. App. 2d 347, 219 N.E. 2d 111. On retrial the jury returned a verdict for the plaintiff for $24,500. Judgment was entered thereon and defendant now takes this appeal. It contends: (1) that the plaintiff was guilty of contributory negligence as a matter of law; (2) that except when the doctrine of last clear chance is applicable, contributory negligence by the plaintiff is a complete defense to the charges of common law negligence and violation of the Federal Safety Appliance Act; and (3) that plaintiff's allegation of defective brakes precludes the plaintiff from relying on the doctrine of last clear chance because under Iowa law, which is applicable here, the doctrine of last clear chance may not be invoked where the defendant's alleged negligence occurred prior to the plaintiff's con-

tributory negligence. Except for the expert testimony as to the efficiency of the brakes on the train, the evidence at the second trial was substantially the same as that adduced at the first.

Plaintiff was an operator of heavy equipment and had been working with a crane at the Dubuque Sand and Gravel Pit adjacent to the track. The crane weighed 25 to 30 tons and from the front of it there extended a 42-foot boom. It was self-propelled by a caterpillar type system with a maximum speed of two miles an hour. Plaintiff planned to move the crane from the gravel pit to another job site and had engaged a truck designed to carry heavy equipment. The pit was separated from a nearby highway by defendant's railroad track, and a private road connected the pit with the highway. Owing to the steepness of the grade and the low clearance of the truck, plaintiff decided to drive the crane under its own power across the grade crossing to the highway.

A provision of the Motor Vehicle Act of the State of Iowa required that vehicles of that character having a normal speed of six or less miles per hour may not be operated across a railroad grade crossing without notice first being given to a superintendent of the railroad in time for the railroad "to provide proper protection at such crossing." No effort was made by the plaintiff to give notice to any agent of the railroad although there was a local train dispatcher in a nearby office. The Act also required a person operating such a vehicle to stop between 10 and 50 feet from the nearest rail and look and listen for an approaching train. Iowa Code Ann., §321.344.

(Appellate Court Opinion)

At 5:00 a.m. on the morning of the accident plaintiff met the driver of the truck, John Reisdorf, at a restaurant about two miles from the gravel pit, stayed there 20 or 25 minutes and then went to a point near the highway side of the track where Reisdorf remained in his truck while plaintiff went to the pit. On the vehicle was a cab painted "highway yellow" which had a seat for the operator in the front on the right side. The cab had ample windows in front and on both sides and in addition there was a door on the left side which was open that morning. The boom which was painted black had been lowered to a point 10 or 15 feet off the ground as was customary during travel in order to give better vision and balance. Right behind the operator in the cab was the motor which made so much noise, the operator could not hear the sound of a train in motion, although plaintiff testified that on other occasions he had been able to hear train whistles. There were no lights anywhere on the crane.

Plaintiff testified that he stopped the crane at a point on the private roadway with the cab 50 feet from the crossing, looked both ways, saw nothing approaching and started across at the full speed of two miles an hour. At that speed it took about 17 or 18 seconds to traverse the 50 feet to the crossing. Plaintiff testified that he did not look to the left again and did not know whether the train whistled or rang its bell. He said that all but eight inches of the rear end of the crane had cleared the track when the train coming from the left side hit the crane.

Reisdorf, the driver of the truck, testified that he remained in his parked truck on the highway side of the tracks with his view of the tracks largely obstructed by a billboard and that he first became aware of the train when it hit the crane. Plaintiff had not asked him to observe the tracks or flag down trains.

Crew members of defendant's train testified that the train's brakes had been satisfactorily tested minutes before the accident, the whistle had been blown at a whistling post 2000 feet from the crossing, the fixed and oscillating headlights were on, illuminating the track for 1000 feet, and the automatic bell ringer was on. A quarter of a mile or more from the crossing, proceeding at 35 to 40 miles an hour, the engineer saw something on the track, quickly made out that it was a boom, set the brake in emergency and continuously sounded the whistle. At impact the train had slowed down to five miles an hour.

The engineer testified that when he asked whether the plaintiff had not seen the train's headlights, plaintiff replied that he "didn't look" and that he had never seen a train along there at that time of the morning. The conductor testified that in response to a question by the engineer, plaintiff said he had not heard the whistle because the machine made so much racket he could not hear anything. Another employee of the defendant, who happened along after the collision, testified that plaintiff asked, *"How come they run a train at that time of day?"*

Plaintiff presented the witness Clifford Moore as an expert on the efficiency of the train's brakes. He is a

retired engineer with 35 years experience with the Nickel Plate Road. In answer to a hypothetical question he testified that in his opinion a train traveling at 35 to 40 miles an hour, under the circumstances prevailing here and with the train in emergency application of its brakes, should have been brought to a full stop within 600 to 700 feet. He further testified that assuming the facts of the instant case it was his opinion that the train's brakes worked ineffecively. He stated on cross examination that an increase in air pressure in the train's brake lines from 70 to 100 pounds would just about double the braking ability; that there was a difference in the stopping distance between a train carrying 90 pounds of air pressure and one carrying 110 pounds; and that in giving his opinion *he assumed a "happy medium" between the two pressures.* It was stipulated that at the prior trial Moore had testified to a stopping distance of between 600 and 700 feet, but that at that time he had assumed the air pressure to be 110 pounds. Plaintiff's case is based on this uncertain testimony.

Arthur Johnson testified on behalf of defendant that he was the fireman on the train and that it carried 90 pounds of pressure on the day in question. Given essentially the same facts that were given to Moore, one Edward Bergman, called as a brake expert by defendant, testified that in his opinion if the train were traveling 40 miles per hour, it would come to a full stop within 1321 feet, while at 35 miles per hour the stopping distance would be 971 feet.

Before considering the points made by defendant, we will consider plaintiff's contention that the law of the

case doctrine estops defendant from making such points. Defendant contends that plaintiff was guilty of contributory negligence as a matter of law and that the Iowa doctrine of last clear chance should not be applied where, as here, the defendant's alleged negligence occurred prior to the plaintiff's negligence. Plaintiff contends that these points were adjudicated and rejected by this court on the prior appeal and that the law of case doctrine is applicable. This contention requires an analysis of our prior opinion.

In the first trial of the case the evidence adduced was much the same as in the instant trial, except for the expert testimony relevant to the condition of the train's brakes. The trial court in the first trial directed a verdict for the defendant as to the count for violation of the Federal Safety Appliance Act and the jury found defendant not guilty as to the count for common law negligence. In reversing and remanding, we held that the trial court erred when it refused to allow the expert witness Moore to answer a hypothetical question relating to the stopping distance of the train. On rehearing the defendant properly pointed out that Moore's answer to the hypothetical question was later admitted, but we concluded that remandment was nevertheless required because of the trial court's original ruling and because of an assertion made by defense counsel in closing argument that the evidence in question had not been admitted. We held that the confusion in the record on that point required remandment despite what we observed was "overwhelming evidence of plaintiff's contributory negligence."

(Appellate Court Opinion)

The law of the case doctrine provides that where the evidence on a subsequent appeal is the same as on the first or prior appeal, or substantially so, the adjudications of such first or prior appeal are binding on the reviewing court on a subsequent appeal. *Hammer* v. *Slive,* 35 Ill. App. 2d 447, 183 N.E. 2d 49; *Bartels* v. *McGarvey,* 331 Ill. App. 275, 73 N.E. 2d 123. The points now raised by defendant in the instant case were not adjudicated in our prior opinion. Nowhere in that opinion did we consider the contention now raised by defendant that the doctrine of last clear chance does not apply where the defendant's negligence is antecedent to the plaintiff's contributory negligence, nor was the point raised by the parties in their briefs. Defendant argued that the doctrine of last clear chance should not be applied, but for a different reason. It argued that plaintiff's amended complaint made inconsistent charges relating to the last chance doctrine and we held against it on that point in our prior opinion.

In the first appeal the defendant was the appellee, having obtained a judgment in its favor in the trial court. As appellee it was required only to answer plaintiff's assignments of error. It had no duty to assign cross-errors nor was it estopped from raising the error on subsequent appeals. *Novitsky* v. *Knickerbocker Ice Co.,* 276 Ill. 102, 114 N.E. 545. Defendant has the right now, judgment having been rendered against it, to raise all contentions not previously adjudicated against it by this court. There having been no adjudication on the prior appeal as to the question of applicability of the doctrine of last clear chance where the defendant's negli-

gence is antecedent to the plaintiff's contributory negligence, we proceed to consider defendant's contentions.

Defendant's first contention is that plaintiff was guilty of contributory negligence as a matter of law. Under Iowa law plaintiff's violation of the statute relating to the operation of vehicles across grade crossings constituted contributory negligence as a matter of law unless plaintiff could show a legal excuse therefor. *Van Patten* v. *Chicago, R.I. & P.R.R.*, 102 N.W. 2d 898 (Iowa 1960); *Wachter* v. *McCuen*, 96 N.W. 2d 597 (Iowa 1969); *Kisling* v. *Thierman*, 243 N.W. 552 (Iowa 1932); *Chicago, R.I. & P.R.R.* v. *Breckenridge*, 333 F. 2d 990 (CCA 8th Cir. 1964). Plaintiff in the instant case offered no excuse for his violation of the Iowa statute regulating the movement of heavy equipment across railroad crossings (Iowa Code Ann., §321.344). To disregard the requirements of that statute and to proceed to drive a crane weighing some 30 tons with a 42-foot boom protruding from the front and limited to a creeping pace of two miles per hour across railroad tracks is negligence as a matter of law.

Contributory negligence is a bar to plaintiff's recovery whether his case is based on a theory of common law negligence (*Yance* v. *Hoskins*, 281 N.W. 489 (Iowa 1938); *Hogan* v. *Nesbit*, 246 N.W. 270 (Iowa 1933)), or on a violation of the Federal Safety Appliance Act. *Crane* v. *Cedar Rapids & Iowa City Ry.*, 160 N.W. 2d 838 (Iowa 1968). That decision was affirmed by the United States Supreme Court in 395 U.S. 164. Consequently the doctrine of last clear chance, on which plaintiff relies, is vital to his case.

(Appellate Court Opinion)

Defendant contends that the doctrine does not apply where the defendant's negligence occurred prior to the plaintiff's contributory negligence, or, in other words, that the doctrine of last clear chance applies only where the defendant knew or should have known of the plaintiff's peril and having the ability to avoid injury, failed to do so. It argues that accepting the plaintiff's theory of the case, the defendant's train was equipped with defective brakes at the time or before it discovered the plaintiff's peril and hence the doctrine does not apply. As stated in our previous opinion, the doctrine under the law of Iowa "presupposes proof of plaintiff's contributory negligence and permits recovery where defendant (1) has actual knowledge of plaintiff's situation, (2) realizes or should realize that he is in peril, and (3) *having the ability* to avoid injury to plaintiff thereafter fails to do so." (Emphasis added.) *Noe* v. *Chicago Great Western Ry.*, 71 Ill. App. 2d 347, 219 N.E. 2d 111; *Vreugdenhill* v. *Kunkel,* 127 N.W. 2d 630 (Iowa 1964); *Tilghman* v. *Chicago & N.W. Ry.,* 115 N.W. 2d 165 (Iowa 1962). It is what the *defendant did or failed to do after it discovered that plaintiff was imperiled* that constitutes the breach of duty for which the defendant is held liable under the doctrine of last clear chance. That doctrine cannot rest upon a breach of duty by the defendant before the peril arose, variously referred to as "primary," "antecedent," "pre-existing," or "prior" negligence. 70 A.L.R. 2d 22, 38 Am. Jur., Negligence, §218; *Menke* v. *Peterschmidt,* 69 N.W. 2d 65 (Iowa 1955); *Vreugdenhil* v. *Kunkel, supra.* In the *Vreugdenhil* case the Iowa Supreme Court rejected the interpretation of last clear chance as urged by the plaintiff and held (p. 634) that

"It is only defendant's negligence *after* he discovers, or in the exercise of due care should have discovered, the plaintiff's danger that brings the doctrine into effect."

Plaintiff argues that a violation of the Safety Appliance Act is determined as of the time the brakes actually failed to operate properly, not at the time the train was placed on the tracks with defective brakes. Hence, it is argued, the wrongful act occurred after plaintiff's contributory negligence and cannot be said to be antecedent. This argument misapprehends the theory behind the doctrine of last clear chance.

Under Iowa law contributory negligence is a defense to a violation of the Safety Appliance Act as well as to an action for common law negligence. *Crane* v. *Cedar Rapids & Iowa City Ry.,* 160 N.W. 2d 838, aff'd. 395 U.S. 164 (Iowa 1969). In *Fairport P. & E. R.R.* v. *Meredith,* 292 U.S. 589 (Iowa 1934) the court held that the Safety Appliance Act does not affect the defense of contributory negligence and that the defense must be determined in accordance with *applicable state law.* In Iowa the doctrine of last clear chance stands as an exception to its general rule that contributory negligence is a complete bar to recovery in an action for negligence or violation of statute. If the requirements of the doctrine are not met, the general rule applies and in this case the essential element of that doctrine is lacking, to-wit: that the defendant, *after perceiving the plaintiff's peril,* had the ability to avoid injuring him.

Plaintiff cites *Fairport, P. & E.R.R.* v. *Meredith,* 189 N.E. 10 (Ohio 1933) for the contrary proposition that a

defendant may be liable under the doctrine of last clear chance in cases arising under the Safety Appliance Act, even though its negligence is antecedent or prior. That case represents a minority view. The reasoning of the Ohio court in *Fairport* was rejected in *Andersen* v. *Bingham & Garfield Ry.*, 214 P. 2d 607 (Utah 1950) as follows (p. 613):

> "Assuming that the defendant in the instant case did operate its train with defective brakes in violation of the Safety Appliance Act, its negligence may be a greater 'wrong', as the *Fairport* case seemed to indicate, but its negligence is not a later 'wrong' which the doctrine of last clear chance contemplates and operates upon."

This conforms to the Iowa law. Regardless of when the alleged violation of the Safety Appliance Act occurred, the plaintiff has failed to present a case for the application of the doctrine of last clear chance and the judgment must be reversed.

Judgment Reversed

DEMPSEY, P.J. and DRUCKER, J. concur.

APPENDIX B

Order of the Supreme Court of Illinois Denying Petition for Leave To Appeal

(Letterhead Of)

State of Illinois
CLERK OF THE SUPREME COURT
Springfield 62706

January 26, 1971

Mr. James A. Dooley
Attorney at Law
111 W. Washington Street
Chicago, Illinois 60602

No. 43834—Ralph Noe, petitioner, vs. Chicago Great Western Railway Company, a corp., respondent. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ *Justin Taft*

Clerk of the Supreme Court